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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JACQUELINE N. RAU,
Conditional Cross-Petitioner,

v.

SHIRLEY STOVER, et al.,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF JACQUELINE N. RAU

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ARGUMENT

I.

THE EIGHTH CIRCUIT ERRONEOUSLY SANCTIONED JUDGE WRIGHT'S SOLICITATION OF CLASS REPRESENTATIVES AND FRUSTRATION OF MS. RAU'S EFFORTS TO BE HEARD.

[Reply to Brief in Opposition at 7.]

Although the Eighth Circuit correctly stated the standard for review of disqualification rulings, it did not apply that standard. Instead, the court relied on facts which caused it to conclude "that Judge Wright certified the class based solely on

his judgment that such action would best serve the interests of all parties involved." App. A, 18a. Judge Wright's true motive is irrelevant. However, his prejudicial acts constitute an abuse of discretion justifying this Court's review on the merits of the Eighth Circuit's decision. *See, United States* v. *Nobles*, 422 U. S. 225, 241-42 n. 16 (1975).

Judge Wright's improper efforts to preserve the putative mandatory class continue even today and further demonstrate his abuse of discretion. On September 30, 1982, Shirley Stover testified that by settling her case she intended to abandon her individual claim before this Court. App. H, 76a, 79a, 83a-86a.* Judge Wright stated that he had no "reservation about [Ms. Stover's settlement] being in any way improper." App. H, 105a. Yet, at the urging of counsel for the putative class, Judge Wright refused to approve Ms. Stover's settlement unless defendants agreed not to raise the issue of mootness before this Court. App. H, 89a-90a, 92a-94a, 96a-99a. Judge Wright thereby abrogated defendants' right to bring relevant new facts to the attention of this Court and Ms. Stover's right to finalize a proper settlement.

II.

THE MANDATORY CLASS ACTION CERTIFIED BY THE DISTRICT COURT DENIES CLASS MEMBERS DUE PROCESS OF LAW, VIOLATES RULE 23, AND IS AN INAPPROPRIATE PROCEDURE FOR MASS TORT LITIGATION.

[Reply to Brief in Opposition at 4-7.]

The putative class representative erroneously asserts that Ms. Rau has no standing to challenge the validity of the class

* The September 30, 1982 hearing before Judge Wright was not transcribed by the filing deadline for Ms. Rau's conditional cross-petition. Pursuant to Ms. Rau's order, the 101 page transcript was delivered to her counsel on October 28, 1982. Appendix H to this brief contains pertinent excerpts from that transcript.

because she does not seek review of an adverse ruling. This argument and the supporting cases cited by the class are inapposite, because Ms. Rau's appeal challenging the validity of the class under Fed. R. Civ. P. 23 was unsuccessful.

The Eighth Circuit did not rule on Ms. Rau's contention that the skywalk cases should not be handled as a class action. Rather, it only held that the district court's injunction against state court proceedings was improper. App. A, 2a n. 4, 19a. Ms. Rau's arguments that class certification was improper would, if accepted by this Court, alter the Eighth Circuit's decision and mandate. Therefore, she must raise these arguments in a cross petition in order for this Court to consider them. *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 381 n. 4 (1970); *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 61-62 n. 11 (1975); *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 560 n. 11 (1976).

The issue of the propriety of a class action in the context of this case is an important question of federal law which has not been, but should be, settled by this Court, if it should consider this case at all. On other occasions, this Court has granted a petition for a writ of certiorari to decide questions concerning the application or interpretation of the Federal Rules of Civil Procedure. *E.g., Provident Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 107 (1968). Furthermore, the issues raised by the petition are so interrelated with the issues raised by Ms. Rau in her conditional cross-petition, that the sound administration of justice suggests that all of these issues should be considered now, if this Court considers any of them.

CONCLUSION

Conditional Cross-Petitioner, Jacqueline N. Rau, strenuously opposes this Court's grant of certiorari in this case for the reasons set forth in her Brief in Opposition. But she respectfully requests that this Court grant her conditional cross-petition for certiorari if this Court grants the petition for certiorari of Shirley Stover *et al.*, No. 82-217.

Respectfully submitted,

November 1, 1982

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SUPPLEMENTAL APPENDIX

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

For the Western District of Missouri

Western Division

Shirley Stover, et al.,
Plaintiffs,

vs.

Crown Center Redevelopment Corporation, et al.,
Defendants.

No. 81-0753-CV-W-5

TRANSCRIPT OF PROCEEDINGS

On Thursday, September 30, 1982, the above-entitled cause came on for hearing before the HONORABLE SCOTT O. WRIGHT, and sitting in Division No. 5 of the above court at Kansas City, Missouri.

APPEARANCES

For the Plaintiffs:

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[2] APPEARANCES
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For the Defendants Crown Center & Hallmark Cards, Incorporated:

Messrs. Lawrence M. Berkowitz and
Robert L. Driscoll
Stinson, Mag & Fizzell
2100 Charter Bank Center
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For the class action plaintiffs:

Mr. Paul M. Wolff
Williams and Connolly
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[23] hospital records indicates that the fractures that you previously described actually extended over an area of at least 18 inches up and down your leg so that there were multiple and many fractures, correct, ma'am?

A. Yes.

Q. It was necessary for the surgeons and physicians there at Truman Medical Center to be involved in more than one surgical procedure to attempt to save your leg; correct?

A. Yes.

Q. And those procedures, among other things, involved the removal of substantial amounts of supporting tissue, as you have described, and also the securing of the bones through nails, plates, and other surgical devices, correct?

A. Yes.

Q. And we're pleased, all of us here, to find that today you have the use of that leg and you were able to walk in this courtroom this morning, were you not, ma'am?

A. Yes.

Q. All right. And in addition to the injuries of your leg, you had the other problems that you have described to the Court with regard to your foot and so forth?

A. Yes.

Q. All right. This is usually an impolite question to ask [24] a lady, but just so we're correct on this, what is your birth date and age, ma'am?

A. January 15th, 1935, and I'm 47.

Q. All right. And you understand, as Mr. Berkowitz inquired, that there are many, many defendants that have been sued in this litigation and you have brought suit against not

only my client, Hyatt, but also against Crown Center, Hallmark and many other defendants, and as a result of what you're asking the Court to do here today you would settle as to all defendants and everyone that was involved at the building of that hotel and in the Hyatt hotel itself; correct, ma'am?

A. Yes.

Q. Further, there are various matters that are pending before this court and there is even an appeal to the United States Supreme Court by way of a writ of certiorari it's called. First of all, do you understand that today when you do this you do it with a note of finality and that all matters that you would be involved in, whether they be appeal proceedings for approval before this court or otherwise, are disposed of from your standpoint?

A. Yes.

Q. All right. And so when you approve this settlement you [25] are no longer authorizing or seeking any relief in this court or by way of appeal to the Supreme Court or any other place, correct?

A. Yes.

Q. All right. And did you authorize an appeal to the Supreme Court, ma'am?

A. I don't know how to answer that.

Q. Do you know if you did? Do you recall doing that?

A. No.

Q. All right. Now, there are—there is also a question in the law, we have a type of damages that's damages other than what we call compensatory damages. The type of damages that would pay you for your leg we call compensatory damages. There is another concept in the law called punitive damages and the purpose being to try to punish people for wrong

conduct or deter them from wrong conduct. You understand that if this settlement is approved today you would waive any claim that you might have to those type of damages as well as the damages that would lie for your husband's death or your injuries?

A. Yes.

Q. All right. And finally, ma'am, you understand that by your settlement today you are also waiving any claim that you might have as part of a group or a class to [26] proceeds or settlement funds?

A. Yes.

MR. WALDECK: All right. Thank you very much, ma'am.

MR. COLLINS: Your Honor, if I might, I have just a couple of more questions.

THE COURT: All right.

REDIRECT EXAMINATION by Mr. Collins:

Q. Mrs. Stover, your daughter, Chris, who is your soon to be 17-year-old daughter, is here in the courtroom today; is that correct?

A. Yes.

Q. You have discussed in detail with her, as well as I have, the terms of this settlement agreement and she has indicated to you that she wishes for you to request approval by the Court of the settlement; is that correct?

A. Yes.

Q. Both you and Chris have been treated by clinical psychologist Dr. George Chance; is that correct?

A. Yes.

Q. And Dr. Chance, has he indicated to you that it would be in your best interests to discontinue your activity in this particular litigation?

A. Yes.

* * * * *

[40] representative. I understand that this matter is very complex and quite serious and I am informed that several attorneys have been appointed by the Court to represent the class, one of whom is my children's and my attorney, Robert L. Collins, of Houston, Texas. I will assist Mr. Collins and the other attorneys to my best abilities and intend to see this matter to its final resolution.

MR. WOLFF: Thank you very much.

Q. [By Mr. Wolff] That is followed by your signature and a notation that it is sworn to you on February 15th, 1982?

A. Yes.

MR. WOLFF: I offer this in evidence, Your Honor.

THE COURT: All right. Any objection?

MR. COLLINS: I have no objection, Your Honor.

MR. WALDECK: None, Your Honor.

THE COURT: All right. Plaintiffs' Exhibit No. 1 will be admitted.

[Plaintiffs' Exhibit No. 1 was received in evidence.]

Q. [By Mr. Wolff] Let me go back to another matter, Mrs. Stover.

[41] As I earlier asked you, a decision was made to seek a new class after the court of appeals decision and you agreed that you would be class representative.

A. Yes.

Q. Is it your decision now that upon settlement of this litigation with the defendants on your own individual behalf that you will dismiss your complaint, including your allegations that you will be class representative?

A. Yes.

Q. And that you are asking the Court not only to dismiss your individual complaint but the class complaint that you have brought?

A. Yes, with me as the representative.

Q. Now, as I asked you earlier, as we discussed, you are aware of the fact that there is presently pending in the Supreme Court, under your name on behalf of the earlier class, an appeal, which is called a petition for writ of certiorari?

A. You're asking me if I am aware of that?

Q. Yes.

A. Yes.

Q. And that appeal is filed as a petition of Shirley Stover individually and as class representative. You're aware of that?

A. Yes.

[42] Q. Is it your decision today that if you settle individually on behalf of yourself and your family that you will move in the Supreme Court to dismiss your petition for certiorari?

A. Yes.

Q. And you have discussed with your lawyer that you will make such a motion of dismissal?

A. Yes.

Q. In discussing the settlement of your case and the case of your family members did Mr. Collins discuss with you what obligations, if any, you had as class representative?

A. Would you repeat that, please?

Q. Yes, I will. You obviously had many discussions with Mr. Collins about what has become the proposed settlement of your litigation.

A. Yes.

Q. During the course of those conversations did you and Mr. Collins discuss at any time what obligations, if any, you had as class representative, either in the action in the Supreme Court or in the action presently in this court?

A. Do you mean as far as my being responsible for—I don't quite understand the question. I don't know if [43] I'm just being dense or what.

THE COURT: No. No, you're not. It's difficult to understand. You go ahead and explain it to Mrs. Stover. You're definitely not being dense. You're pretty smart.

THE WITNESS: Thank you.

Q. [By Mr. Wolff] Mrs. Stover, as you state in your affidavit, and as I'm sure you knew when you took on the role as class representative, that you were representing not only yourself and your family but many other people who were affected by the disaster?

A. Yes.

Q. And as class representative you were not—you were their spokesperson?

A. Yes.

Q. And actions you took affected not only you and your family but them?

A. Yes.

Q. And that if you did something one way or another it might possibly affect not only you and your family but also these other class members?

A. Well, I suppose it could. I don't quite understand what I would have done.

Q. In discussing this settlement did Mr. Collins and you have any discussions about what your actions would have [44]

with respect to the new request for class certification that was filed on your behalf in this court?

A. I don't think so.

Q. Did he tell you at any time if you dismissed your case in this court how it may or may not affect other people?

A. He said there might be a difficulty in getting another class representative. Is that what you mean?

Q. I don't mean anything. I just want to know what was the conversation between you and Mr. Collins about the effect of your dismissal of this case upon the class members?

A. He mentioned to me that there might be a difficulty in obtaining another class representative if I would settle, and I—that's when I had told him I would go ahead as representative but I preferred not to. That's about it, I think.

Q. Did he tell you if you settled and moved to dismiss your petition for certiorari what effect that would have on the other people whom you represented in that Supreme Court action?

A. He may have told me. I can't recall anything specific at the moment.

Q. Did Mr. Collins tell you whether in any discussions he had had with any of the defense counsel, the people on [45] the other side, had mentioned that if there was going to be a settlement they wanted you to drop your case in this court?

A. If there was going to be a settlement—

Q. You were to drop your case in this court?

A. I would assume that would naturally follow. Am I not understanding you correctly?

Q. You are understanding me fine.

Did he tell you specifically whether any of the people representing the defendants told him that you must drop your case if you wanted to settle?

A. I don't remember that he said anyone specifically said that.

Q. But did he say as a group that they said it?

A. I'm not sure. I don't really know.

Q. Did Mr. Collins tell you that any individual or the lawyers for the defendants as a group wanted, desired, insisted, any of those, that you drop your case in the Supreme Court if there was going to be a settlement?

A. I don't remember that he did.

Q. Did Mr. Collins tell you that if there was going to be a settlement you would drop your case in the Supreme Court?

A. Yes.

Q. Did he tell you if there was going to be a settlement [46] you would drop your case in this court?

A. Yes.

Q. Do you recall when Mr. Collins told you those two things? Was it a month ago, two weeks ago, yesterday, this morning?

A. I would assume it was two weeks ago on the phone. I—I guess I wasn't taking very good notes.

Q. Have you ever heard the term fiduciary duty?

A. I believe I have. I don't know exactly what it means.

Q. Have you heard it in the course of this litigation?

A. I'm not sure.

Q. Did Mr. Collins ever tell you that you had fiduciary duties to the other members of the class on whose behalf you acted?

A. No.

Q. Did Mr. Collins ever explain to you if you dismissed your petition in the Supreme Court what would happen to other people whose interests you represented?

A. Not specifically.

Q. Did he generally tell you what would happen to the other people whose interests you represented if you dropped your matter in the Supreme Court?

A. The only thing I can think of is that he said there might be trouble getting another class representative, some people might not be represented.

[47] MR. WOLFF: No further questions, Your Honor.

MR. COLLINS: I have a few questions if I might, Your Honor.

THE COURT: All right.

FURTHER REDIRECT EXAMINATION by Mr. Collins:

Q. Mrs. Stover, when Mr. Wolff was questioning you about dropping your case or dismissing your case, either in this court or in the Supreme Court, your answer was concerning your case individually; is that correct?

A. Yes.

Q. As a matter of fact, you and I had many discussions prior to—over the weekend and several days before the weekend prior to the hearing of September 13th before this court concerning the second application for certification of a class action; is that correct?

A. Yes.

Q. Those discussions centered for the most part around the settlement discussions that I had been having with the defendants and the request by both myself and other class counsel that even if you settled your claims individually that you would continue as class representative; is that correct?

A. Yes.

Q. As of the hearing of September 13th, which was a Monday following the Thursday and Friday after you agreed to

[48] settle your case, as of that time did you still offer and intend to offer to serve as class representative should the Court desire you to serve in that capacity and should the Court certify a new class action?

A. Yes.

Q. Was it your understanding that the following day, September the 14th, Mr. Younger, who is Mr. Wolff's partner, informed me that he, Mr. Younger, and Mr. Wolff had determined that your offer to serve in that capacity was rejected and that they did not desire to present to the Court you as an alternative for class representative in the new class that was being proposed?

A. Yes.

Q. At that time did you make a determination that you no longer wished to even make the offer to be class representative, since you had been rejected and since you truly desired to settle your claims and put all of this matter behind you?

A. Yes.

Q. As a matter of fact, prior to that time, based on your discussions with your psychologist and family members and others who advise you, you really didn't want to continue as class representative but you offered to do so for the benefit of those persons who might comprise [49] the class; is that correct?

A. Yes.

Q. But when you were rejected by Mr. Younger and Mr. Wolff, you no longer desired to act in that capacity?

A. Yes.

Q. Clearly though, as of the time of the hearing of September 13th before this court, your understanding was that you were settling or going to ask the Court to approve the

settlement of your individual claims and the individual claims of your children but that you continued to offer to serve as class representative?

A. Yes.

Q. You and I specifically discussed that there was not any agreement on our part, as a part of the terms of this settlement agreement, that you would refuse to serve as class representative, didn't we? I explained to you, in other words, that we specifically had not agreed nor discussed with the defendants a refusal on your part to serve as class representative as a part of this settlement?

A. Yes.

Q. The affidavit that you earlier executed and that was filed with the court indicated to the extent that you are able you will serve the class. Do you feel that you are able emotionally and psychologically and that [50] your children are able emotionally and psychologically to continue to serve as class representatives?

A. No.

Q. Do you believe that it would be detrimental to your best interests, both psychologically and emotionally, and to the best interests of your minor child Chris and your adult children, to continue involvement in this litigation in any fashion?

A. Yes.

Q. Do you have any objection to the action pending before the Supreme Court, on behalf of the class action, continuing to be pursued by class counsel, that is, the class action that—question that is pending before the Supreme Court and the application for certiorari has been discussed?

A. Do I have any objection to it, did you say?

Q. Yes, ma'am. That is, that the class action issue be pursued, not your individual issues?

A. No, I have no objection.

Q. We have not, as a matter of fact, discussed that we will move—that is, you and I will move in the Supreme Court, for a dismissal of the application for writ of certiorari pending as to the class action issues?

A. No.

[51] Q. What we have discussed is that your individual claims would be dismissed in all courts; is that correct?

A. Yes.

Q. Have you ever been interviewed or discussed this case or received any correspondence concerning this case from Mr. Wolff, Mr. Younger, anyone with Williams and Connolly, or any other law firm or attorney anywhere?

A. No.

Q. The only person that you have ever had any contact or dealings with has been myself; is that correct?

A. Yes.

Q. The only person that you have any agreements with concerning expenses or attorneys' fees is myself; is that correct?

A. Yes.

Q. You have specifically understood that you would not have a liability for any of the class action expenses and that those expenses would be borne by the attorneys who were paying the expenses; isn't that correct?

A. Yes.

[Plaintiffs' Exhibit A was marked for identification.]

MR. COLLINS: May I approach the witness, Your Honor?

THE COURT: Yes.

* * * * *

[56] You may step down, Mrs. Stover. Be careful there, now.

[The witness was excused.]

MR. COLLINS: Your Honor, the plaintiff moves for approval by the Court of the settlement as described. We have prepared in conjunction with the defendants an order of approval of the settlement and would ask the Court to enter that order of approval in accordance with the terms of the settlement as outlined by Mrs. Stover's testimony to the Court.

THE COURT: All right.

Well, now, I think I understand everything about this except for one thing. Let me ask you about it. It isn't too clear to me.

She understands she's only dismissing her own suit?

MR. COLLINS: Yes, sir.

THE COURT: She doesn't have any intention of dismissing the class suit that's now pending in the Supreme Court of the United States?

MR. COLLINS: Yes, sir, that is correct. To the extent that there is an individual action pending before the Supreme Court, that action would necessarily be dismissed as a part of this settlement as well as the individual action which is pending before this [57] court.

I think I could point out to the Court that I was not consulted nor was I specifically involved in the decision to file the application for writ of certiorari at the time that it was filed by the Williams and Connolly firm in Washington and I would expect, although they have not discussed this with me, that they would continue to pursue that application for writ of certiorari on behalf of the class even if the prior class representative had ultimately subsequently settled the claims and was no longer the class representative.

THE COURT: Well, she doesn't have an individual claim pending in the Supreme Court of the United States, does she? She's just a class representative.

MR. COLLINS: Yes, sir. Mr. Wolf—

THE COURT: What would she have to dismiss in the Supreme Court of the United States?

MR. COLLINS: I don't believe that individually there is an action pending before the Supreme Court that would be dismissed. I think that question was asked by Mr. Wolff and he indicated at that time that she had individual and as well as on behalf of the class an action pending in the Supreme [58] Court. I think Mrs. Stover understood that to mean that any individual action would be dismissed and, of course, that is the agreement that we have reached with the defendants that we are asking the Court to approve, that her individual actions be dismissed. However, she had even until September the 14th, when we were informed by Mr. Younger that he and Mr. Wolff had elected to reject her as class representative, had even offered at that point to continue.

THE COURT: That was a new class, though, wasn't it?

MR. COLLINS: Yes.

THE COURT: I'm not worried about the new class or anything like that, but does anybody have a different view of that, that she's got an individual claim pending in the Supreme Court of the United States that has to be dismissed before you can settle this case?

MR. WOLFF: Let me respond to that briefly, Your Honor.

First of all, the issues raised in the Supreme Court are the class issues. The issues are whether an interlocutory appeal of a certification of a mandatory class is appropriate, solely a class issue.

The second issue is whether a mandatory class as [59] certified by you violates the Anti-Injunction Act, again solely a class issue. But before you answer or after the answer I want to add a few things for the record so we will not have a mistaken record, or at least we will have both sides in the record.

THE COURT: Let them respond. Mr. Berkowitz.

MR. BERKOWITZ: I think the petition was brought on behalf of herself individually and on behalf of the class. I'm not sure what that means in terms of—you know, what it means in the Supreme Court. I think it's a requirement of the court that they be given notice that she has settled her claim.

THE COURT: Well, giving notice that she settled the claim is something different than saying you're going to file a motion to dismiss in the Supreme Court.

Does anybody have a copy of the petition for writ of certiorari? Is she appealing her own claim? What could she appeal? She doesn't appeal her own claim.

MR. WOLFF: Your Honor, several things. First of all, the caption is entitled that she is petitioner individually and as class rep because that is the caption from this court, and contrary to old form you don't change the names when you petition. The Court itself may restructure the caption but you don't [60] change the name and you maintain the same caption, but as I pointed out just a few seconds ago, the only two issues before the Supreme Court on certiorari are the class issues.

I may have slipped and my memory may have failed me, but to the best of my knowledge there is no rule in the rules of the Supreme Court that Mr. Berkowitz is talking about that you must notify the court of a settlement.

It is clear from Mr. Waldeck's questions, and I think it was clear to Your Honor because you asked the questions that I think brought the matter to a head, and that is, if there is a settlement of individual claims, the defendants will, as fast as they can get out of this courtroom, proceed to their offices and attempt to get the cert. petition dismissed as mooted by her settlement.

THE COURT: I'm not going to approve anything like that because I think that the issue before the Supreme Court ought

to be resolved. I'm not—any new class or anything like that or settling her individual claim, but anything to run to the Supreme Court and say this thing is mooted now, I'm not going to—I won't go along with that.

MR. WOLFF: May I address those points?

[61] THE COURT: All right.

MR. WOLFF: And address the settlement.

First, I don't want any bickering but I just want to make the record clear that Mr. Collins' statement of the conversations with Mr. Younger and what we said to him about Mrs. Stover continuing as class representative in a new class I believe is a mischaracterization, but whether he has the right characterization or I do I think is irrelevant.

With respect to the cert. petition, I believe that Mr. Collins' memory has failed him and it was a matter that was discussed and that he was sent a draft of a cert. petition and clearly he was sent several copies of the final cert. petition and, of course, at all times he has remained silent about any claim that this was filed contrary to her wishes or against her desires. I want to make that clear.

Let me address the point of the settlement and go down the various points.

It is with no enjoyment that we're here today, Your Honor. But we are here and we asked for this conference because 35 years ago the Supreme Court in Young v. Higbee decreed that a class representative, of a denied class, a class not yet certified, or an ongoing class has certain responsibilities beyond the [62] responsibilities of aggrandizing one's own settlement. And I put in the record because I think it is so important that the record reflect these duties.

The Supreme Court said that parties cannot avail themselves of the statutory privilege of litigating for the interests of a

class and then shake off their self-assumed responsibilities to others by a simple announcement that henceforth they will trade in the rights of others for their own aggrandizement.

Since the Supreme Court made that decision some 35 years ago, the other courts that have addressed this problem have looked at three questions, and I want to address each one in turn.

The three questions are, does the mere size of the settlement given the individual reflect collusion, collusion in the sense that there has been a selling of the class representative position.

2. Has the class representative breached fiduciary duties to class members?

3. Should this court order paid now or at some future date some amount of money of the fees recovered by counsel for the settling party to reimburse those individuals who pursued the class action or the consolidated litigation.

Let me address them one at a time. The question [63] of collusion.

As you know, Your Honor, through a letter dated September 17th, 1982, to protect the privacy of Mrs. Stover and the privacy of the defendants, we asked interrogatories and requests for production by letter form rather than a public pleading. Both Mr. Berkowitz, on behalf of the defendants, and Mr. Collins accepted this approach and replied in like form, Mr. Collins by letter of September 27th, Mr. Berkowitz by a letter of September 21st.

I ask that Your Honor in reaching a decision on settlement take these three letters as exhibits in this case and consider them as if they were pleadings on public file.

In those documents, the letter from us requested information about settlements and about settlement figures and about

other settlements to find out if there was an argument that the class representative role had been sold.

Both Mr. Collins and Mr. Berkowitz gave us only cursory information, saying that all other information requested was either privileged or work product. We believe it's neither. But we don't want to know more than we should know, but we do want the Court to know because this Court must make a decision whether or not [64] this settlement is fair or excessive.

I submit that on the basis of the information you now have you cannot make a determination whether this amount was on the button, within the range of reasonableness, excessive, or maybe, in light of other settlements, low.

We don't know what the present value of other offers are, of other settlements; we don't know what the guaranteed portions are.

I ask this, Your Honor, that you require Mr. Berkowitz and Mr. Collins to submit to you in camera the information called for by our request of September 17th, and then you and only you will have the information and then you will decide whether or not this settlement is the bargaining away of the class representative position because of the disparity between it and other settlements, or whether it's a fair and reasonable settlement that should be approved.

I don't care to know. But I think you should know and I ask that you require them to submit to you this information.

THE COURT: Let me ask you this, now. When I designated this class, Mrs. Stover submitted an affidavit and she said that she would see through the final resolution of this matter. Now, the final [65] resolution of this matter, that we were talking about, I'm not talking about any new class because I understand that. She doesn't want to serve and I don't blame her. But on the class we had, she said she would follow through this to the final resolution and that means it's in the lap of the

United States Supreme Court and it should be decided, and I'm not going to be a party to any settlement or authorizing any settlement that's going to—that the defendants are going to run up there and ask for this to be mooted out now that she's settled. That's just all there is to it.

If the defendants represent to me that they are not going to do that, I'll approve the settlement. If they represent to me that they are, then I'm going to consider the matter further.

MR. WOLFF: I would like to hear from them because depending on what they say, I have further response.

THE COURT: I would like to, too.

MR. DRISCOLL: Judge, Robert Driscoll on behalf of Crown Center and Hallmark.

Do I understand the Court to say that approval of this individual settlement of Mrs. Stover today is contingent upon whether or not the defendants make the statement to the Court you just now asked for?

[66] THE COURT: I'm asking you if that's what your intentions are, that you're going to use this settlement to try to get the hearing before the United States Supreme Court mooted, which you know that that is a legitimate issue that ought to be decided.

MR. DRISCOLL: Well, Your Honor, of course, all defendants aren't in this courtroom now and are not in any way involved in this settlement, for that matter, and can't be bound by anything that the lawyers here say or don't say.

THE COURT: I think you had better talk it over, then, because, look. You are in a—in a way, you are representing all the defendants because she's dismissing against every defendant that could possibly be held liable in this matter, not just your all's clients but everybody's.

MR. DRISCOLL: Well, in discussing with other defendants what the Court just said, I want to make sure that I do

understand. Is it the Court's position that this matter cannot be approved unless the defendants agree not to seek dismissal of the matter pending before the Supreme Court?

THE COURT: I think that's a fair statement.

MR. WALDECK: Your Honor, if I could respond as to part of the defendants that are represented here [67] today.

We have no present state of mind to do that or not to do it. In fact, to be perfectly candid with the Court, I haven't considered it either way. I have to confer with my associate counsel. If the Court is saying that the approval is conditional, as I understand you in response to Mr. Driscoll's statements, then I must go confer with my client because—

THE COURT: I understand that.

MR. WALDECK: But I want to make one thing clear. We come here today jointly asking for your approval of Mrs. Stover's personal injury claim and wrongful death claim in the sense that you and I as damage suit lawyers would think of as an individual claim. That was why the testimony was adduced in the manner that it is, so we asked for that.

The second phase I can neither say yea or nay to because I need to refer to my client. I'm troubled by the idea, as suggested by counsel, that we have run out and do that. We have no present state of mind to do either. I couldn't say yes or no to that.

MR. BERKOWITZ: As far as I know—

THE COURT: Well, what brought it up was no one told me that the case in the Supreme Court was even [68] remotely related to this settlement. But she testified that part of the agreement was that she would dismiss the case in the Supreme Court.

MR. WALDECK: The record adduced today, Your Honor, and I think in a fair reading of the record, either under Mr.

Wolff's examination or anyone else, is that Mrs. Stover comes here today understanding that as class representative she's settling her individual claim, and then we wanted to know what her understanding is. If she's going to settle something, this woman must do it knowingly and that's the purpose of the record so she can tell us she either heard that or didn't hear it.

MR. BERKOWITZ: It was not part of the agreement, Your Honor. You made the statement, it was not part of the agreement that she dismiss that petition. That wasn't her testimony and that wasn't the—any—there wasn't any such agreement.

MR. COLLINS: Your Honor, if I might clarify because I think that Mr. Wolff's questioning and the method by which he questioned led us to this problem.

I think Mrs. Stover could clarify it. If I misstate the facts of her understanding, if she will point out to the Court at this point, that there has been no agreement on her part to dismiss the [69] application for writ of certiorari pending before the Supreme Court as it relates to the class action certified by this court in January of 1982. She has agreed to dismiss individual actions that she may be pursuing, wherever they may be pursued, as opposed to class action questions.

Mr. Wolff's question concerning individually and as representative of the class in the Supreme Court is I think what causes the problem, not because he asked the question just because of the way we all heard it, and I do want the Court to understand that there is no agreement on behalf of this plaintiff or her children to dismiss any action pending before the Supreme Court or pending before this court relative to certification of a class action.

I would point out, however, that the Fifth Circuit Court of Appeals has reached this very issue on prior occasions. Application for cert. by the Supreme Court was denied in that

particular case wherein that court specifically held that giving away an application for a writ of certiorari was not a breach of a fiduciary relationship of the class representative to class members, and specifically in that instance the court approved the giving away or compromise of a pending application for writ of certiorari to the [70] Supreme Court concerning class action issues.

I do, however, want to make it very clear to the Court that there is no agreement nor are we asking the Court to approve dismissal of the application for writ of certiorari presently pending in the Supreme Court. We are simply asking for approval of the dismissal of individual claims of Shirley Stover and her adult children as those individual claims were originally filed in this court prior to the certification of the class action in January of this year, and it is those individual claims only that we are here to consider and it is only those.

THE COURT: I don't see how her individual claim could possibly be before the Supreme Court of the United States. There is no appeal on that. The whole thing was the class.

MR. COLLINS: It was the decision of the Eighth Circuit that was appealed concerning certification of the class action and I would ask Mrs. Stover now, have you made any agreement or do you intend to file a motion asking that that writ, that application for a writ of certiorari, be dismissed concerning the Eighth Circuit's decision relative to this court's certification of the class action?

MRS. STOVER: No.

[71] MR. WOLFF: That's fine, Your Honor. But let me deal with the more important problem. Mr. Collins says Mrs. Stover will not seek to dismiss her certification. That's fine. But what you heard from the defendant's side of the table I submit is sheer double-talk. They will not tell you whether they are going to or not going to do it. Without a commitment you can

rest assured that as soon as this settlement is completed, if you approve it, whether it's individual or class claims, they will be in the Supreme Court seeking to move to have it dismissed as moot.

In fact, a letter was sent from interveners to either Mr. Collins or somebody else, which we got a copy of, pointing out that they wanted to know whether the case was mooted in the Supreme Court by her settlement because they threw in a few threats that if you don't moot it now and we print our response to cert. petition you're stuck with our costs so it is clearly an issue. Both the interveners and the defendants will be in the Supreme Court pronto seeking to derail that cert. petition

Now, the case that Mr. Collins talks about, first of all, was overruled seven years after that by the Roper decision and then by the Supreme Court in the affirmance of Roper, but be that as it may, Mr. [72] Collins' case dealt with a cert. petition of a denial of an interlocutory appeal so any other class member could have gone back up to the court of appeals and then to the Supreme Court. There was no finality. We have been to the court of appeals, we have had a decision.

If this cert. petition is dismissed, no class member can ever raise the issue again, the issue of the propriety of your first class will be dead. It can never be revisited, whether there is a new class or whether a member of the old class seeks to do anything. I submit the following, Your Honor.

To test the mettle of the defendants and to find out whether or not they aren't bargaining for the death of the cert. petition in this settlement, let's do the following. Either get from them a commitment, not the speaking out of both sides of their mouths that we don't know what we're going to do and we have made no agreement, but get a commitment from them that they will not seek to moot the cert. petition and find out whether they are really settling individual claims or trying to kill the cert. petition, then we'll know what they really bar-

gained for. If they only bargained for Shirley Stover's individual claims, then they should be happy to allow the cert. petition to go forward.

[73] Secondly, before you approve this settlement, certify Jackson and Vrabel, or one of them, as class rep in a new class and allow them time to intervene in the Supreme Court and to have themselves added as named petitioners, and thus hold off the settlement until they have had the opportunity to intervene and let's find out if when they try to intervene, those two diverse plaintiffs, whether defendants will oppose that, because I submit the following.

If Shirley Stover is settling her individual claims, God bless her. If the defendants are using this as a gimmick or a device to kill the cert. petition, then it should be stopped and it should be stopped in this courtroom. And I ask you to take those actions with respect to the settlement but make sure that either people have an opportunity to intervene in the Supreme Court who have diversity, Jackson and Vrabel, or you get a commitment out of them.

THE COURT: Who is Jackson? Now, is that the—

MR. WOLFF: The lady from Utah.

THE COURT: Utah. All right.

MR. WOLFF: Vrabel is the man from Maryland.

I thing that's important because then we'll know what the defendants were bargaining for. Because a cert. petition raises major issues. Cert. may be [74] denied, I don't know. At least the opportunity should be given—the opportunity should be given to those people on whose behalf Shirley Stover brought an original class which was certified to find out whether they have a (b)(1) class or not.

THE COURT: To tell you the truth, this never entered my mind, that this would even come up.

I'm going to give the defendants an opportunity to discuss this with all the defendants and come back and make some representation to me about this.

I can't believe that they would—I tell you. This case is—the things that have gone on in this case just tear me up.

MR. BERKOWITZ: Judge—

MR. WALDECK: Judge, why do you presume we're going to do something? Don't do that.

THE COURT: I'm not.

MR. WALDECK: Don't make that representation.

MR. BERKOWITZ: Don't make the assumption that we even thought about it. That's not true. Don't make any assumption that we made a decision based on that.

THE COURT: All right. Well, how soon can you let me know? I hate to hold this settlement up.

MR. WALDECK: Just we'll do it in a matter of [75] days.

MR. DRISCOLL: The defendants again meet as a group tomorrow.

THE COURT: All right.

MR. COLLINS: Your Honor, if I might clarify. Mr. Wolff and Mr. Younger have both had ample opportunity to discuss this not only with myself but with the defendants and this is the first time this issue has been raised or has been brought to question.

I asked Mr. Wolff before the hearing began today what his intentions were and what he intended to raise to the court. I think it could have been discussed in a much less fervent atmoshpere than it has been presented to the Court.

There has never been any discussion in any of the settlement negotiations that have ever taken place between myself.

on behalf of the Stovers, and the defendants of an agreement to dismiss any action pertaining to the class action. Specifically, we never even discussed or agreed that in fact she would refuse to serve as class representative after approval of her settlement.

I contemplated at the time of the hearing of September 13th that Mr. Younger would inform you at that time that she did offer to continue to serve, but [76] that there were restrictions upon that because of her desire to have limited active involvement and, as a matter of fact, at a two o'clock telephone call on the 14th, the following day Mr. Younger suggested that at the hearing we had proposed for that Friday a proposed order certifying the new class be presented to the Court describing the limited involvement of Shirley Stover as class representative. Two hours later, at four o'clock, Mr. Younger called me back and made this information known to me that they no longer wanted Mrs. Stover and that is the point at which we had the conference call with the Court and Mr. Berkowitz where we postponed until today.

Mrs. Stover wants a settlement on behalf of herself and her children. Her doctors have indicated to her it's in her best interests to discontinue active involvement in the prosecution of these claims, and I believe very candidly that it is in her best interests and in her children's best interests to discontinue their involvement in the case.

THE COURT: Mr. Wolff, you understand that was the reason I didn't let them take her deposition.

MR. COLLINS: Yes, sir, I understand.

THE COURT: I wasn't going to let her go through that. They could find out what they wanted to [77] know in another manner.

MR. WOLFF: Your Honor, let me address this. There is several matters that must be separated out. First of all, let me focus on Mrs. Stover and Mr. Collins.

Mr. Collins said with respect to a new class, the issue is now before you in its beginning stages.

THE COURT: Mr. Wolff. You know, I don't want to interrupt, but if she was wanting to settle her case, I wouldn't have appointed her as a class representative anyhow.

MR. WOLFF: I agree. I agree. I say that's why we must—we must separate that out from the class she did represent to the Supreme Court.

THE COURT: That's what I'm talking about.

MR. WOLFF: I'm saying they are two totally separate things. The matter was raised by Mr. Younger to Mr. Collins. Where do we stand on her in the Supreme Court? Mr. Collins said, we will decide that after the settlement is approved. That's why—

MR. COLLINS: I object, Your Honor—

MR. WOLFF: Let me finish.

MR. COLLINS: —to Mr. Wolff making any representations concerning conversations between myself and Mr. Younger. Mr. Wolff wasn't a party to those, [78] unless he listened unbeknownst to me, or heard a recording that was made unbeknownst to me, and I would hate for him to misrepresent to the Court, then I'm going to have to stand up and tell the Court what I understood the conversation to be is not productive.

THE COURT: Let's don't get bogged down.

MR. WOLFF: The point of the matter is we asked for this conference because we were uncertain as to what would happen with the matter in the Supreme Court and it was clear to us, from the letter and what was going on at the interveners and the defendants and our knowledge, which we think as litigators of what someone would do.

THE COURT: What was the letter from the interveners?

MR. WOLFF: The interveners sent out a letter, which we got a copy, wanting to know if Mrs. Stover considered her case in the Supreme Court mooted, and if they did they wanted to be informed that she was going to dismiss it so they could save the costs of printing their brief.

Then they said, if you desire to continue we call to your attention that you will be held responsible for costs, and then unbeknownst to us we got a copy of it, but it's clear from that and from any logical analysis [79] of what is going on that if this settlement is approved they will seek to moot the cert. petition, and I say, Your Honor, if this is only the settlement of the Stover claims then Mr. Berkowitz should be able to say, we're only settling the individual claims and we commit to you, we will allow the cert. petition to go forward.

THE COURT: They are going to talk to their people and come up with that.

MR. WOLFF: Can I ask you another thing?

THE COURT: All right.

MR. WOLFF: I ask you before you approve the settlement you pass on the Vrabel and Jackson petitions so that if they are certified they can move to intervene to give Belton Suspenders protection to the cert. petition so we can have people attempt to intervene in the Supreme Court on behalf of the class.

THE COURT: If you tell me—if they come back and tell me that they are going to try to get the case mooted up there because Shirley Stover settled her individual claim, I will—if a motion is filed, I'll consider that before I approve the settlement.

MR. WOLFF: I'm sorry. Would you repeat that, please? If the motion is filed.

THE COURT: If they indicate that—the defendants indicate to me that their intention is to [80] use this settlement to

moot the matter now pending before the Supreme Court of the United States, this settlement, then I will give the—I will consider a motion to certify the Jackson and Vrabel to intervene as class representatives and to substitute her and then I can settle her claim.

MR. WOLFF: Because I want to make it clear, my last point, and that is that I do not take issue at the present time with Mr. Collins' statement. He has now said that she will continue to pursue the cert. petition. And I say that is fine, we welcome that. And that she will not withdraw. What I don't welcome is what they may do on the other side.

THE COURT: I want to let Mrs. Stover settle her claim. She's a lovely lady and she's been through too much already and I don't want her to get bogged down in all this business.

MR. WOLFF: Nobody agrees with you more than I, Your Honor, that if it is a settlement only of the Stover family claims it should be done forthwith, and she should be allowed her piece and quiet. But if there is any ploy in this to damage the interests of those who are represented by her in the cert. petition, Your Honor should bring that to a halt and not allow the defendants to do it. That is why I think it is [81] important that you require them to come before you and make the representation you requested. If they don't make that representation, that you immediately act on the Jackson and Vrabel matter and allow them the opportunity to seek intervention before you pass on the settlement. If we had those assurances from the defendant today, we could move forward.

THE COURT: Well, they need to talk to these other people and I can understand that.

MR. WOLFF: Can I move to the last matter? The last matter, in approving this, you must deal with is the question of fees and costs. If you will read the exhibit offered by Mr. Collins, the July 1st letter from me, you will see that that letter

addresses what would happen if this case met without success and no money was recovered, either from judgment or settlement, to pay fees and expenses. It said he would look to his clients, we would look to our clients. It did not address the issue and we have never addressed the issue of what would happen if there was success either in whole or in part and money was brought into this case as a result of the work in the federal action.

Now, the cases are legion in the district courts in both class actions and consolidated actions. When

* * * * *

[98] compelled, by the Florida case or any other case, to apportion any part of this settlement to Mr. Wolff or anyone else.

Secondly, that a material portion of this settlement agreement between the Stovers and the defendants concerns the payment of attorneys' fees and expenses and that absent the agreement as to the attorneys' fees and expenses there is no settlement, and, therefore, I would ask the Court to approve the settlement as it has been presented today, to approve the amount as reasonable and fair under the circumstances, to approve the payment of attorneys' fees and expenses, and I continue to represent to the Court at the time when class certification is finalized or when a class action is finally approved by the Supreme Court and application is made for attorneys' fees and expenses, I will be happy to present to the Court a determination of what my attorneys' fees or expenses might have been and ask the Court to include that in the monies to be apportioned among the class counsel who take the case to trial or who at that point settle the case.

THE COURT: Well, now, some of the expenses that you have charged against Mrs. Stover, were some of those expenses incurred in your participation in the [99] class?

MR. COLLINS: No, sir. No, sir. There has been a separation of expenses in my office as to those relative to the class and those relative to Mrs. Stover individually and she will only pay out of the recovery from this settlement those that are relative to her individually. Those that I have otherwise, I will not recover and make no claim for.

THE COURT: All right. Well, it won't be necessary for Mrs. Stover to come back, and pending notification from the defendants, why, I won't approve the settlement today, but as soon as I get that, why, I will. I don't have any reservations about the adequacy of the settlement and I don't have any reservation about it being in any way improper, too much, too little or anything like that.

I take it, from what you all told me, you will be getting word to me by tomorrow evening?

MR. WALDECK: Yes.

MR. DRISCOLL: We have a regularly scheduled meeting tomorrow morning with all defendants. Whether they will all be there, I don't know.

THE COURT: Just let me know as soon as you can. I may be gone tomorrow afternoon because I have to go down to Jefferson City and swear in the new [100] lawyers but I will be back here then Tuesday afternoon.

MR. DRISCOLL: We'll get it to you prior to then.

THE COURT: All right.

Is there anything else?

MR. WALDECK: Nothing, Your Honor.

MR. BERKOWITZ: Nothing.

THE COURT: Mrs. Stover, it's nice to have met you and I wish you the very best.

MRS. STOVER: Thank you very much.

THE COURT: Okay. We'll be in recess.

[Adjournment.]

[101] **CERTIFICATE**

I, Lee W. Sharp, Registered Professional Reporter, do hereby certify that I am a duly appointed, qualified and acting Official Court Reporter for the United States District Court for the Western District of Missouri; that the foregoing pages contain a true and correct transcript of the proceedings had in the within-entitled cause on the date stated therein, and that said transcript is a true transcription of my shorthand notes taken therein.

_____RPR, CM

Official Court Reporter